Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-925

Edna I. Baker and Roger L. Baker,

APPELLANTS

vs.

Oregon State Bar, Albert R. Musick, Holger M. Pihl, Claire Tri, Robert Briggs, John R. and Jacqueline C. Skourtes, William Hurley, James E. Auxier, Estate of Paul M. Reeder, Paul M. Reeder, and Frank Porcelli jr.,

APPELLEES.

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APPEAL FROM THE SUPREME COURT OF THE ~~STATE OF~~ OREGON Ct App

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# JURISDICTIONAL STATEMENT

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*December 11, 1979*

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Compiled and annotated by M.P.Deady
1845 - 1864
Henry L. Pittock, State printer, 1866
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IN THE SUPREME COURT OF THE UNITED STATES

*OCTOBER TERM, 1979*

Edna I. Baker, et al,_____*Appellants*,

vs.

Albert R. Musick, et al,_____*Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

## JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellants Edna I, Baker and Roger L. Baker file this statement of basis for Supreme Court jurisdiction to review the FINAL ORDERS entered by the Oregon Supreme Court in SC 26295 and SC 26310, and should execise jurisdiction herein.

## OPINIONS BELOW

The Oregon Supreme Court refused to review or to provide an opinion on either the civil or the probate matter. Plaintiffs suggest that it is difficult for the State Judiciary to justify removing Mrs. Baker as personal representative of her father's estate, while she was enforcing contract terms which the State Supreme Court had affirmed in GINDHART vs. SKOURTES (1975) 271 Or 115, 530 P2d 827.



## GROUNDS FOR JURISDICTION OF SUPREME COURT

Jurisdiction of this Court is invoked under the provision of Title 28, United States Code, Section 1257(2), wherein, a state's highest court has ruled against a challenge to the unconstitutionality of a state statute, ORS 9.160, and the related ORS 9.320, as hereinafter fully set forth in App C-2.

The final orders in these two cases were issued on September 12, 1979, and timely notice of appeal was served Dec. 10, 1979. Dismissal orders had been issued on September 5, 1979, which had caused appellants to serve premature Appeal notices on Sept. 17, 1979, as the later orders had not been received.

This appeal arises from an action to recover damages as a result of the defendants' abuses of process, and to recover property taken as a result of the State of Oregon having changed state law in a manner which impaired plaintiffs' right to an Obligation of a Contract, in violation of Article I, Section 10 of the United States Constitution.

Plaintiffs contend that this Court has never been called upon to resolve

the particular questions brought in this case, although, certain cases will support the elements of these particular questions as follows:

a. contract impairment, and police powers; ALLIED STRUCTURAL STEEL CO. vs. SPANNAUS (1978) 438 US 234,242,247, 57 LEd 2d 727, 98 SCt 2716;

BROWN-CRUMMER INV. CO. vs. TOWN OF NORTH MIAMI (1935) 11 FSupp 73,74;

b. separation of powers;

SWEEZY vs. NEW HAMPSHIRE (1957) 354 US 234,255, 1 LEd 2d 1311,1327, 77 SCt 1203;

DAGWELL vs. THORNTON (1953) 199 Or 8, 259 P2d 125;

c. judicial act as state act;

BARROWS vs. JACKSON (1952) 346 US 249,254-255, 97 LEd 1586, 73 SCt 1031

## QUESTIONS PRESENTED

1. Whether Impairment of Contract clause is prohibitive of Judicial Legislation, in light of Separation of Powers mandate ?

2. Whether state officers may deprive plaintiffs of State Constitutional guarantees, in violation of Federal Equal Protection Clause?



## STATEMENT OF THE CASE

This matter is an appeal from contract interference brought in: the probate court (Washington County Circuit Court # E1533) of the State of Oregon, where review was requested and refused in the State Court of Appeals,# CA12109, and in the State's highest Court, # SC26295; and by civil action in the Circuit Court of Multnomah County for the State of Oregon, # A7708-12051, where review was requested, and refused in the State Appeals Court,# CA13792, and the State Supreme Court, # SC26310.

The Impairment of Contract issue was brought by plaintiffs in their first complaint of the civil action, although the state courts have never responded to that issue.

The probate appeal was brought with an appended copy of the civil complaint to show that the probate judges (as defendants) and the replacement personal representative (Robert Briggs) were well aware of the allegations.

Each of the dismissals by the state courts were an affirmation, or an acquiesence, of the contract impairment.

The original problem began as probate

of an estate, where Mrs. Baker is the sole legatee, testamentary executrix, and subsequently the personal representative.

The estate was the legacy of Mrs Baker's father, Fritz Gindhart, and the major asset was a land sale contract which had been ordered to be specifically performed. see GINDHART vs SKOURTES (1975) 271 Or 115, 530 P2d 827.

The sequence of events were as follows:

1. The contract buyer was more than a year in default on his payments after the mandate was issued;
2. The estate attorney, James E. Auxier, had to be fired as he had collaborated with the judge to deprive Mrs. Baker of statutory rights;
3. The buyers' attorney, William Hurley threatened to have Mrs. Baker removed as personal representative, although he had no just cause;
4. The probate judge, defendant Pihl, swore to a false affidavit, so that he could act to remove Mrs. Baker from representing the estate;
5. The named defendants conspired to remove Mrs. Baker as personal representative of her father's estate:



(a.) so the buyers could avoid the default clause of the contract;
(b.) so the probate judge could award summary determinations against the estate without full plenary trials.

6. The Multnomah County Circuit Court allowed each and every one of the defendants' motions to dismiss, or to strike, without a trial of any issues which had caused plaintiffs' damages.

## SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, beginning with the right of contract, which is a basic constitutional guarantee.

While it seems to be true that the later rulings seem to disfavor applying the contract impairment clause to a judicial act, this case is not that simple. Appellants understand the reasoning behind contract adjudication, as necessary to resolve a conflict between parties to the contract. The first distinction in this case is that the contract had been adjudicated, and found to be lawful. The second distinction in this case is that the probate court, which acted to damage plaintiffs, had no authority to interfer with Mrs. Baker's right to enforce the specific terms of the contract.

Plaintiffs contend that the ruling in SWEEZY vs. NEW HAMPSHIRE prohibits a state court from blatant invasion of the Separation of Powers clause of the United States Constitution. This guarantee is in the Oregon State Constitution also, as Art. III section 1, which is fully set out in App C-1 The Legislative power, which the probate court had invaded, is the right to represent one's own interests in court. This is provided to the public by Oregon State Law, ORS 9.160, and the related ORS 9.320, set out in App C-2 ORS 9.320 is one of those prime rights, as it is organic law, and it says, in part:

> Any action, suit, or proceeding may be prosecuted or defended by a party in person, - - - . (see App C-2)

(Oregon Civil Code chapter 14, title I, section 1001 - Oct 11,1862) Deady pp 397-398, see Authorities table of index.

Plaintiffs submit that any court which attempts to take away organic rights, which are considered to be beyond legislative powers in some holdings, has certainly overstepped the Separation of Powers clause. There is not even a question of legislative intent to consider.



Plaintiffs submit that this judicial act, by defendant judge Pihl, which in fact legislates amendment to ORS 9.160, is repugnant to Article I, section 10 of the United States Constitution. This ruling would be consistent with other holdings that a judge is a state official, and that a judge is prohibited from violating a constitutional mandate.

The second question which plaintiffs bring to this court is, must the state courts provide the right of recourse for damage as a result of illegal acts of persons, as mandated by Oregon State Constitution Article I, section 10; and must the courts provide jury trials as mandated by Oregon State Constitution Article I, section 17 ?

Plaintiffs contend that the courts have deprived them of the foregoing rights in a biased and unequal manner. That the Oregon State Courts have a mysterious and constantly shifting set of rules which they apply to persons appearing for themselves, and even to young and inexperienced attorneys.

## CONCLUSION

For the reasons stated above, appellants submit that this appeal brings before the court an issue which has never been framed to test the intent of the United States Constitution. It is also true that the issue of Equal Protection of the Law is central to the acts of the defendants in this matter, and should be considered concurrently.

Article I, section 10 of the United States Constitution stands by itself as a JURISDICTIONAL MANDATE prohibiting contract impairments by the state.

The issue of Equal Protection is mandated by the 14th Amendment to the United States Constitution, and is enforceable under the civil rights acts such as Title 42, United States Code, Section 1983.

These are important Contract Impairment and Discrimination allegations, which require plenary consideration, with briefs on the merits and oral argument for their resolution.



## ORDERS OF THE STATE SUPREME COURT

ON THE CIVIL APPEAL - SC 26310

September 12, 1979

Re: CA # 13792

The Supreme Court has today considered and denied your motions dated June 7, 1979, filed here June 8, in the above entitled matters

---

September 7, 1979

Re: CA # 13792, SC 26310

The Supreme Court on September 5, 1979, denied Appellants' Petition for review in the above entitled matter

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July 12, 1979

Re: CA # 13792, SC 26310

Pursuant to Rule of Procedure 10.10 the Court of Appeals has considered the Petition for Review in the above case and has on July 10, 1979, decided not to rehear the matter or change its decision. Therefore, the Supreme Court will proceed to determine whether to grant review. No mandate can issue until the Supreme Court has completed its review of the petition.

---

## ORDERS OF THE STATE SUPREME COURT

ON THE PROBATE APPEAL - SC 26295

September 12, 1979

Re: CA # 12109

The Supreme Court has today considered and denied your motions dated June 7, 1979, filed here June 8, in the above entitled matters.

---

September 7, 1979

Re: CA 12109, SC 26295

The Supreme Court on September 5, 1979, denied Appellant's Petition for Review in the above entitled matter.

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June 26, 1979

Re: CA 12109, SC 26295

Pursuant to Rule of Procedure 10.10 the Court of Appeals has considered the Petition for Review filed in the above case and has today, decided not to rehear the matter or change its decision. Therefore, the Supreme Court will proceed to determine whether to grant review. No mandate can issue until the Supreme Court has completed its review of the petition.

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## ORDERS OF THE STATE APPEALS COURT

### ON THE CIVIL APPEAL - CA 13792

*(CAPTION)*

Appeal from MULTNOMAH County
Circuit Court
No. A770812051
CA 13792

The Court having considered respondents' motions to dismiss the above-entitled appeal as to respondents Musick, Pihl, Tri, Briggs, The Oregon State Bar and Porcelli, and the Court on its own motion on May 17, 1979, ordering that the appeal be dismissed as to the other respondents, Skourtes, Hurley, Reeder, the Estate of Reeder, and Auxier, and the Court being fully advised:



IT IS HEREBY ORDERED that said motions are allowed and said appeal is dismissed. The casue is remanded to the court below. This mandate shall there be entered as final order in this matter.

It is FURTHER ORDERED that respondents Musick, Pihl and Tri recover from appellants costs and disbursements in this Court taxed at $90, and that respondents Oregon State Bar recover from appellants costs and disbursements in this court taxed at $90, and that respondent Porcelli recover from appellants costs and disbursements in this court taxed at $90.

ENTERED at Salem, Oregon, May 17, 1979.
ISSUED: JUN 14 1979

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June 12, 1979

Re: CA 13792

The Court of Appeals has today denied the appellant Baker's objections to the respondent Porcelli's cost bill filed in the above-entitled matter. Costs will be allowed to respondent Porcelli and to all other respondents who filed motions to dismiss. Our mandate will provide accordingly.

---

May 17, 1979

Re: CA 13792

The Court of Appeals has today allowed the motions to dismiss filed on behalf of the respondents Musick, Pihl, Tri, Briggs, Oregon State Bar, and Porcelli in the above entitled Matter, and has today on its own motion ordered that the appeal be dismissed as tc the other respondents This letter constitutes the order of the Court-of Appeals. A mandate will issue in due course.

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# ORDERS OF THE STATE APPEALS COURT

## ON THE PROBATE APPEAL - CA 12109

*(CAPTION)* Appeal from WASHINGTON County
Circuit Court
No. E1533 CA 12109

This cause having come on to be heard on appeal and having been duly submitted and considered and the Supreme Court having de nied review on September 5, 1979:

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this caues is affirmed.

IT IS FURTHER ORDERED that respondent recover from appellant costs and disbursements in this court in the amount of $ -0-

The cause is returned below for further proceedings pursuant to law and the opinion and order of the court entered May 14,1979.

ISSUED at Salem, Oregon: SEP 14 1979

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IN THE SUPREME COURT OF THE STATE OF OREGON

Edna I. Baker, etc., Appellants — Multnomah Co.
vs. — A7708-12051
Albert R. Musick, etc., Respondents. — CA 13792
SC 26310

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In the Matter of the Estate of FRITZ GINDHART dec'd, Edna I. Baker Appellant, — Washington Co.
vs. — E1533
Robert Briggs Respondent. — CA 12109
SC 26295

## NOTICE OF APPEAL

Appellants in the above entitled matter hereby give notice of appeal into the United States Supreme Court as provided by Title 28, United States Code, Section 1257(2), wherein, the state's highest court has ruled against a challenge to the repugnancy of ORS 9.160 and related ORS 9.320 to the Ccntract Impairment Clause, ARTICLE I, SEC. 10 of the UNITED STATES CONSTITUTION.

Appellants hereby request the total records be prepared and certified, in accordance with Rule 12 of the United States Supreme Court, so that appeal may be had.

The final orders in these two cases were issued on September 12, 1979, but were not received by appellants until after timely notice of appeal was served on Sept. 17, 1979, in respect to the Sept. 5, 1979, dismissals.

Dec. 10,1979

EDNA I. BAKER, Appellant

AFFIDAVIT OF SERVICE

STATE OF OREGON )
Multnomah County) ss.

I, Edna I. Baker, Appellant in the above entitled matter, after being duly sworn, depose and say that I served a true and complete copy, as certified by me, of REQUEST FOR DESIGNATION and CERTIFICATION OF RECORD, and the NOTICE OF APPEAL IN THE MATTER, upon the following persons at their regular addresses:

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Portland, Or 97204

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Salem, Or 97310

on Dec. 10 ,1979 by depositing the same in the United States Post Office in Portland, Oregon with first class postage prepaid in accordance with Supreme Court Rules 33(1) & 33(3c)

Edna I. Baker,Appellant

Notary Public for Oregon
My Commission expires.....



# OREGON CONSTITUTION CITED

Article I, BILL OF RIGHTS

SECTION 10:
No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.—
*(New provision Sept. 18,1857-Deady, p.98)*

SECTION 17:
In all civil cases the right of trial by jury shall remain inviolate.—
*(old Art.I,Sect.2,Organic Law-Deady p. 59)*

Article III, DISTRIBUTION OF POWERS

SECTION 1
The powers of the Government shall be divided into three seperate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.—
*(old Art.I,Sect.6,Organic Law-Deady p. 63)*

Article IV, LEGISLATIVE DEPARTMENT

SECTION 1

(1) The Legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.
(following omitted)

# OREGON STATUTES CITED

9.160 - Vol 1, p.74, Oregon Revised Statutes 1953 Edition, rev. 1977

Except for the rights reserved to litigants by ORS 9.320 to prosecute or defend a cause in person, no person shall practice law or present himself as qualified to practice law unless he is an active member of the Oregon State Bar.

9.320 - Vol 1, p.75, Oregon Revised Statutes 1953 Edition, rev. 1977

Any action, suit, or proceeding may be prosecuted or defended by a party in person, or by attorney, except that the state or a corporation appears by attorney in all cases, unless otherwise specifically rovided by law. Where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of his client as between him and the adverse party, except as provided in ORS 9.310.
Amended by 1975 c. 451§171
*(old Oregon Civil Code chapter 14, Title I, Section 1001, October 11, 1862-Deady p. 397-398)*

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-925

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EDNA I. BAKER AND ROGER L. BAKER,

PLAINTIFFS-APPELLANTS

v.

OREGON STATE BAR, ALBERT R. MUSICK, HOLGER M. PIHL, CLAIRE TRI, ROBERT BRIGGS, JOHN R. AND JACQUELINE C. SKOURTES, WILLIAM HURLEY, JAMES E. AUXIER, ESTATE OF PAUL M. REEDER, PAUL M. REEDER AND FRANK PORCELLI, JR.,

DEFENDANTS-APPELLEES

---

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OREGON

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# MOTION TO DISMISS

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[See inside cover for counsel.]

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-925

---

EDNA I. BAKER AND ROGER L. BAKER,

PLAINTIFFS-APPELLANTS

v.

OREGON STATE BAR, ALBERT R. MUSICK, HOLGER M. PIHL, CLAIRE TRI, ROBERT BRIGGS, JOHN R. AND JACQUELINE C. SKOURTES, WILLIAM HURLEY, JAMES E. AUXIER, ESTATE OF PAUL M. REEDER, PAUL M. REEDER AND FRANK PORCELLI, JR.,

DEFENDANTS-APPELLEES

---

APPEAL FROM
THE SUPREME COURT OF THE STATE OF OREGON

---

MOTION TO DISMISS

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Pursuant to Rule 16(1)(a) and (b) of the Rules of the Supreme Court of the United States, defendant-appellee Frank

Porcelli, Jr. by his attorney Ridgway K. Foley, Jr. and defendants-appellees Judge Albert R. Musick, Judge Holger M. Pihl and Claire Tri by their attorney Donald E. Hershiser, and defendant-appellee Oregon State Bar by its attorney Jack L. Kennedy, move the United States Supreme Court to dismiss Plaintiffs Roger L. Baker and Edna I. Baker's appeal from the Supreme Court of the State of Oregon on the following grounds:

1. The appeal is not within the jurisdiction of this court, because it is not taken in conformity to 28 U.S.C. § 1257(2).

2. The appeal does not present a substantial federal question.

3. The federal question sought to be reviewed was neither timely or properly raised nor expressly passed on by the courts of the State of Oregon.



4. The judgment of the Supreme Court of the State of Oregon rests upon an adequate non-federal basis.

## STATEMENT

The facts of this case involve three different law suits. Plaintiff Edna Baker originally sued defendant Skourtes in equity as conservator and eventually personal representative of her father's estate to rescind a land sale contract entered into by him on grounds of incompetency. Defendant Skourtes counter-claimed for specific performance of the contract. In Gindhart v. Skourtes, 271 Or. 115, 530 P.2d 827 (1975), the Oregon Supreme Court held that Mr. Gindhart was competent and ordered specific performance of the contract. The Bakers were then living in the house on the property.

The alleged facts upon which plaintiffs are presently suing defendants arise out of the "probate case," Washington County Circuit Court No. E1533. One cannot determine from the seven complaints filed in the third case, the "civil appeal," what defendants allegedly did wrong during the probate proceedings which affected the Gindhart/Skourtes contract.

The factual allegations of the Seventh Amended Complaint, prepared by an attorney, follow. Plaintiffs allege that defendant Paul Reeder failed to advise Mrs. Baker of proper accounting methods and the necessity of keeping a trust checking account separate from personal funds which caused her removal as personal representative of her father's estate (7th Amended Complaint, 1st Cause of Action, paras. III-V). Defendant



Reeder also allegedly placed an attorney's lien against two checks in his posession received from the Skourteses on the land sale contract. He later filed a Summary Determination of his attorney fees and the Washington County Court scheduled a hearing for April 3, 1975 (7th Amended Complaint, 2nd Cause of Action, para. XIII). Plaintiff's attorney at that time, James Auxier, allegedly negotiated a settlement for one-half of the claimed fees, but Mrs. Baker notified Mr. Auxier that she rejected defendant Reeder's claim and fired Mr. Auxier (7th Amended Complaint, 2nd Cause of Action, paras. XIII-XIV). On April 3, 1975, at the hearing, defendant Pihl allegedly ordered Mrs. Baker to obtain counsel to "assist her in the proper handling of the Estate of Fritz G. Gindhart" and notify the court by April 14,

1975 (7th Amended Complaint, 2nd Cause of Action, para. XV, and 5th Cause of Action, para. VIII). Plaintiff allegedly hired Frank Porcelli, Jr. in April, 1975, and allegedly notified the court (7th Amended Complaint, 5th Cause of Action, para. VII). Plaintiff also alleges that Mr. Porcelli informed the court on May 8, 1975 that he did not represent Mrs. Baker (7th Amended Complaint, 5th Cause of Action, para. XV and 7th Cause of Action, para. VII). Defendant Pihl then removed Mrs. Baker as personal representative on July 8, 1975, and appointed defendant Briggs as the successor personal representative (7th Amended Complaint, 5th Cause of Action).

Plaintiff repeatedly alleges that her removal as personal representative caused plaintiff "to lose the right to



prosecute the forfeiture clause of the Gindhart/Skourtes land sales contract to her damage" (7th Amended Complaint, 2nd Cause of Action, para. XX, 3rd, 5th, and 6th Causes of Action). Mrs. Baker alleged that the "contract was in default" because the 1974 payment needed to be reissued and the 1975 payment did not include interest (7th Amended Complaint, 5th Cause of Action, para. XII) and thus subject to the "forfeiture clause". Plaintiff also alleges that defendant Musick issued an order for her arrest for contempt of court allegedly upon petition of the successor personal representative for her refusal to turn over the records of the estate (7th Amended Complaint, 3rd and 4th Causes of Action).

Mr. and Mrs. Baker then brought an action in Multnomah County, Oregon Circuit

Court on August 25, 1977 in which seven amended complaints were eventually filed. The names of the defendants periodically changed as did the causes of action which included fraud, intentional infliction of emotional distress, negligence, malpractice, abuse of process, loss of consortium, conversion, and the like. On January 15, 1979, the court entered a judgment order in favor of defendant Porcelli upon defendant's demurrer; on February 20, 1979, the court entered a judgment order in favor of defendants Musick, Pihl and Tri upon defendants' motion to dismiss; and on November 6, 1977, the court dismissed the action against the Oregon State Bar. Plaintiffs appealed the Multnomah County Circuit Court judgments. Most defendants filed Motions to Dismiss the Appeal upon



a variety of procedural grounds such as failure to timely file the Notice of Appeal and failure to file a sufficient appeal bond. The Court of Appeals dismissed plaintiffs' appeal upon defendants' motions and upon its own motion. On September 5, 1979, the Supreme Court refused to accept plaintiff's Petition for Review. On September 12, 1979, the Supreme Court ruled upon plaintiff's last motions and refused to consolidate the Multnomah County Circuit Court appeal with the Washington County Circuit Court probate case.

Plaintiffs filed two notices of appeal upon both cases to the United States Supreme Court.

## QUESTIONS PRESENTED

As stated by plaintiffs, the questions presented by this case are:

1. Whether Impairment of Contract clause is prohibitive of Judicial Legislation in light of Separation of Powers mandate?

2. Whether State officers may deprive plaintiffs of State Constitutional Guarantees in violation of Federal Equal Protection Clause?

## ARGUMENT

I. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT BECAUSE IT IS NOT TAKEN IN CONFORMITY TO STATUTE.

Plaintiff seeks review pursuant to 28 U.S.C. § 1257(2) which is not a proper remedy for two reasons:



1. Plaintiffs are not drawing into question the validity of a State statute on the ground of it being repugnant to the Constitution, treaties or laws of the United States;

2. The Oregon Supreme Court made no decision in favor of the validity of a challenged State statute. 28 U.S.C. § 1257(2).

First, the only State statutes addressed by plaintiffs are ORS 9.160 and ORS 9.320. ORS 9.320 provides that any action, suit or proceeding may be prosecuted or defended by a party in person, and ORS 9.160 provides that no person shall practice law unless he is an active member of the bar "except for the rights reserved to litigants by ORS 9.320." (See Jurisdictional Statement, p. C-2). Plaintiffs have never urged that these statutes violate the United States Constitution or laws.

The Oregon statutes do not guarantee that a person may continue in his fiduciary position as personal representative without legal counsel when, as plaintiffs allege, he fails to maintain an separate trust account or prepare accountings. The statutes only address the rights of "litigants" to a law suit or a "party" to an "action, suit or proceeding" to appear in person without representation by an attorney.

Plaintiff argues that one possesses a "legislative power" to "represent one's own interest" in court (Jurisdictionsl Statement, p. 7). Once the judicial branch refused to allow Mrs. Baker to proceed as personal representative of her father's estate, it supposedly invaded legislative powers and violated the Separation of Powers mandate (Jurisdictional



Statement, p. 7).[1] Plaintiff does not argue that the statute itself violates the United States Constitution. Plaintiff argues only that the judge's interpretation of ORS 9.160 impaired her father's contract. Since the facts demonstrate the plaintiffs do not challenge the statute itself on grounds of unconstitutionality, this court does not possess jurisdiction on appeal.[2]

Second, contrary to plaintiffs' assertion (Jurisdictional Statement, p. 2), no decision was made by either the trial court, the Court of Appeals, or the Supreme

---

[1]The Separation of Powers issue was raised for the first time in the Jurisdictional Statement.

[2]Since plaintiffs do not actually challenge the constitutionality of a state statute, their appeal cannot be treated, in the alternative, as a petition for certiorari. 28 U.S.C. § 2103; 28 U.S.C. § 1257(3).

Court of the State of Oregon in favor of the constitutionality of ORS 9.160 and ORS 9.320. The Oregon appellate ocurts dismissed the appeal upon procedural grounds without ever addressing the validity of the State statutes as did the trial court. The trial court granted defendants' motions based on a variety of grounds, such as failure to state a cause of action, failure to comply with the Statute of Limitations and immunity without ever ruling upon the validity of the State statutes.

The constitutionality of ORS 9.160 and ORS 9.320 was not "actually considered and decided." Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182, 185, rehearing denied, 324 U.S. 863 (1945); Harding v. Illinois, 196 U.S. 78 (1904). In Central Land Co. v. Laidley, 159 U.S.



103 (1895), this court dismissed an appeal for want of jurisdiction because:

> "The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the constitution of the United States, but whether the highest court of the state has erred in its construction of the statute."

Plaintiffs do not possess the right to an appeal pursuant to 28 U.S.C. § 1257(2).

II. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION .

The presence of a federal question is the sine qua non of exercise of appellate jurisdiction by the United States Supreme Court over decisions of state courts. Zucht v. King, 260 U.S. 174, 176 (1922). This case does not present a substantial federal question.

Plaintiffs do not contend that ORS 9.160 or ORS 9.320 are unconstitutional because of some federal constitutional right. Plaintiff claims only that a series of events which allegedly involved interpretation of the statutes resulted in the impairment of a contract when she, in her capacity of personal representative, was required to obtain counsel. Failure to comply with the court's order to obtain an attorney together with other



alleged indiscretions resulted in her removal as personal representative, and the successor personal representative allegedly did not seek foreclosure of a contract as she would have. Mrs. Baker did not possess a "right to enforce the specific terms of the contract." (Jurisdictional Statement, p. 6). Only a properly acting personal representative could enforce the estate's rights. Plaintiffs are not challenging the validity of the statutes themselves. This is not a situation where enactment of a State statute impaired an existing contract.

Even if ORS 9.160 and ORS 9.320 were challenged on grounds of repugnancy to the impairment of contract clause of the United States Constitution, the Constitutional provision governs only State action:

> "No State shall pass * * * any * * * law impairing the Obligation of Contracts, * * *."
> U.S.Const. art. I, § 10.

The purpose of this clause is to limit the legislative power of the State. Central Land Co. v. Laidley, supra, 16 S. Ct. at 82. The constitutional provision prohibits a State from passing a subsequent law which alters, modifies or nullifies existing contracts. United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 17-18, rehearing denied 431 U.S. 975 (1977); Bacon v. Texas, 163 U.S. 207 (1896); Schlothan v. Territory of Alaska, 276 F.2d 806, 814 (9th Cir. 1960), cert. denied 362 U.S. 990 (1960).

Plaintiffs concede that "* * * later rulings seem to disfavor applying the contract impairment clause to a judicial act * * *." (Jurisdictional Statement, p. 6). Barrows v. Jackson, 346 U.S.



249, 260, rehearing denied 346 U.S. 841 (1953); Mariniello v. Shell Oil Co., 511 F.2d 853 (3rd Cir. 1975). The contract impairment clause does not reach construction of a statute by a judge. The constitutional provision also does not apply to individual conduct such as that of Mr. Porcelli and Ms. Tri. Poirier v. Hodges, 445 F.Supp. 838, 842 (D. Fla. 1978).

## III. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NEITHER TIMELY NOR PROPERLY RAISED, NOR EXPRESSLY PASSED ON BY OREGON COURTS.

### A. Not Timely or Properly Raised.

The only theory previously raised by plaintiffs is the impairment of contract clause. U.S.Const. art. 1, § 10. Plain-

tiffs did not preserve this issue throughout the proceedings, however. Plaintiffs did not rely upon the United States Constitution art. 1, § 10 in the Seventh Amended Complaint upon which the trial court entered judgment and from which plaintiffs appealed.

Plaintiffs have never previously raised the question of whether the Separation of Powers mandate, the Equal Protection clause or 42 U.S.C. § 1983 were violated by any of defendants' alleged acts. Monks v. New Jersey, 398 U.S. 71 (1970).

In addition, the federal questions sought to be raised by plaintiff were not expressly passed upon by the Oregon courts. None of the courts either discussed or upheld the constitutionality of an Oregon statute.



The Oregon Court of Appeals granted defendants' motions to dismiss based upon procedural grounds. Defendant Porcelli moved to dismiss the appeal because it was not filed within the thirty-day statutory period after judgment was entered in his favor. ORS 18.125; ORS 19.026. Judgment was entered as to defendant Porcelli on January 15, 1979, and plaintiffs filed their notice of appeal on March 22, 1979 (see Porcelli's Motion to Dismiss Appeal and Memorandum filed March 30, 1979). Plaintiffs responded that they never intended to include defendant Porcelli in the appeal:

> "1. It is statutory to provide Notice of Appeal to all partys (sic) who have been involved in an action, regardless of the appealability of any specific order. Since plaintiffs had not submitted any order on appeal concerning defendant Porcelli, attorney

> Reeves' motion is patently frivolous." (Response to Motion to Dismiss served April 2, 1979).

Plaintiffs also objected to defendant Porcelli's cost bill upon the same ground:

> "Plaintiffs' Notice of Appeal did not assign any order dismissing defendant Porcelli. The fact that defendant Porcelli had been included within the notice was to fulfill the statutory requirements for notice of appeal." (Appellant's Objections to Defendant Porcelli's Cost Bill served May 24, 1979).

Thus, defendant Porcelli evidently was never considered to be a party to the appeal before the Oregon courts and should not be a party to this United States Supreme Court appeal. Rule 10(4) of the Rules of the Supreme Court of the United States.

Defendants Pihl, Musick and Tri as well as defendants Briggs, and Oregon State Bar moved to dismiss the appeal because plaintiffs filed an insufficient



appeal bond. ORS 19.038, 19.040, 19.045. Rather than filing an open-ended surety bond, plaintiffs deposited $415.60 in court. The court of appeals allowed the motions to dismiss and, on its own motion, ordered dismissal as to the other defendants (Jurisdictional Statement, p. A-2). The Court of Appeals thus never expressly passed upon the constitutionality of any State statute.

The Oregon Supreme Court's jurisdiction is now discretionary and it denied review. ORS 2.516; ORS 2.520; Rule 10.15 of the Supreme Court and Court of Appeals of the State of Oregon Rules of Appellate Procedure (1979). The highest court of the State thus never expressly passed upon any federal question. The federal question was not presented to the State

courts in such manner that it was necessarily decided by the highest State court. In Newman v. Gates, 204 U.S. 89 (1907), this court held that no decision of a federal question had been reached when the highest court of the state dismissed the appeal because of a defect of parties on appeal. In Fuller v. Oregon, 417 U.S. 40 (1974), this court refused to review due process claims concerning Oregon's recoupment statute which were not raised in the State court and were not discussed by the Oregon Court of Appeals. The Supreme Court should similarly decline review in this case.

IV. JUDGMENT RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

As outlined above, the decision of the Court of Appeals rests upon plaintiffs'



failure to comply with State procedural statutes regarding appeals. In Michigan v. Tyler, 436 U.S. 499 (1978), this court held that failure to present a federal question in conformance with State procedure constitutes adequate and independent grounds barring review in the United States Supreme Court, so long as the State possesses a legitimate interest in enforcing its procedural rule. See also Johnson v. New Jersey, 384 U.S. 719, 735-736, rehearing denied 385 U.S. 890 (1966); Wainwright v. Sykes, 433 U.S. 72, 86-87, rehearing denied 434 U.S. 880 (1977). Compliance with appellate procedural rules serves a legitimate state interest.

In addition, the judgment of the trial court rests upon adequate non-federal grounds. The trial court entered judgment

upon defendant Porcelli's demurrer for failure to state a cause of action and failure to comply with the statute of limitations. ORS 16.260; ORS 12.110. Plaintiffs attempted to state a cause of action for fraud and misrepresentation against Mr. Porcelli (7th Amended Complaint, 7th Cause of Action). See, e.g., Preston v. Chicago, 226 U.S. 447 (1913); Johnson v. Risk, 137 U.S. 300 (1890). The trial court entered judgment upon defendants Pihl, Musick and Tri's Motion to Dismiss on grounds of immunity, lack of tort claims notice and failure to state a cause of action. ORS 16.260; ORS 30.275; Smith v. Smith, 396 F. Supp. 367, Aff'd 519 F.2d 1376 (D. Or. 1973); Clifton v. Hawkins, 218 Or. 368, 345 P.2d 255 (1959); Utley v. City of Independence, 240 Or. 384, 386, 402 P.2d 91 (1965). Plaintiffs



attempted to plead abuse of process, intentional infliction of emotional distress, false imprisonment and misrepresentation against the judges (7th Amended Complaint, 3rd - 6th Causes of Action). Plaintiffs alleged that the Oregon State Bar, by failing to "prosecute" Judges Pihl and Musick for perjury, had joined in the "scheme" to interfere with plaintiffs' and the estate's contract rights. The trial court dismissed the action against the Oregon State Bar upon state grounds, although final judgment was never entered. The court's decisions rest upon independent and adequate state grounds, both procedural and substantive.

Plaintiff argues that his second federal question is whether the state courts must provide recourse as mandated by the Ore. Const. art. I, § 10 and must

provide jury trials as mandated by Ore. Const. art. I, § 17. If the Oregon appellate courts had made any decision regarding these issues which are raised for the first time upon appeal to the United States Supreme Court, their decision would have rested upon adequate state grounds. Plaintiff relies upon only the Oregon State Constitution for his jury trial and remedy arguments (Jursidictional Statement, p. 8).

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal should be dismissed.



DATED this _____ day of January, 1980.

Respectfully submitted,

SOUTHER, SPAULDING, KINSEY, WILLIAMSON & SCHWABE

By: _____
Ridgway K. Foley, Jr.
of Attorneys for
Defendant Porcelli

HERSHISER, MITCHELL, MOWERY & DAVIS

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Donald E. Hershiser
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KENNEDY, KING & McCLURG

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Jack L. Kennedy
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Oregon State Bar

Supreme Court, U.S.
FILED
FEB 4 1980
MICHAEL RODAK, JR., CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-925

Edna I. Baker and Roger L. Baker,

APPELLANTS

vs.

Oregon State Bar, Albert R. Musick, Holger M. Pihl, Claire Tri, Robert Briggs, John R. and Jacqueline C. Skourtes, William Hurley, James E. Auxier, Estate of Paul M. Reeder, Paul M. Reeder, and Frank Porcelli jr.,

APPELLEES.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

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## BRIEF IN RESPONSE TO DISMISSAL MOTION

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*Appellants, pro se:*

*EDNA I. & ROGER L. BAKER*

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IN THE SUPREME COURT OF THE UNITED STATES

*OCTOBER TERM, 1979*

NO. 79-925

Edna I. Baker, et al, _____*Appellants*,

vs.

Albert R. Musick, et al, _____*Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

## BRIEF IN RESPONSE TO DISMISSAL MOTION

Pursuant to Rule 16 (4) of the United States Supreme Court, appellants Edna I., & Roger L. Baker file this brief in response to the defendants' motion to dismiss for the purpose of indicating false facts as well as misleading representations by the defendants

## STATEMENT TO CORRECT DEFENDANTS' ERRORS

This case is the result of one fraudulent equity suit, but that is not the issue before this Court. It is the subsequent abuses by the Courts of the State of Oregon, and of the officers of those courts. The fact that the courts would not enforce their



own mandate for specific performance, and the fact that the courts have violated the statutory mandates from the people of the State of Oregon which require trials of any alleged damages.

### A

The defendants admit the specific performance decree, (motion p-3) but totally ignore the buyers' (Mr. & Mrs. John R. Skourtes) default, before and after the decree. As an added inference, the defendants refer to a house in which plaintiffs were living, but that house was not on the property of the land sale contract.

### B

The defendants (motion p-4) twisted facts of defendant Reeder's failure to properly direct and maintain the conservatorship, somehow, into the false impression that Mrs. Baker had failed to properly handle her duties as personal representative of her father's estate, whereas:

1. Mrs. Baker made full accounting as personal representative of the estate;
2. and Mrs. Baker maintained an estate checking acount from the minute she had been appointed.

C

The defendants then refer to defendant Reeder's lien on checks in the land sale, (motion p-5). The facts are that defendant Reeder held two checks, each one of which was for an amount of more than his total claim against the estate. Subsequent events proved that the buyer did not have funds to make a later payment if defendant Reeder had deposited the two checks into a trust account.

D

Continuing on (motion p-5) in the same vein, the defendants then allege that defendant Reeder filed for a summary determination on his claim and the court scheduled a hearing, whereas, the truth is that the court set a hearing date, and a few days later, defendant Reeder petitioned for the hearing.

The failure of the probate court to maintain an impersonal standing in the probate procedings, along with the probate court's failure to uphold the statutory mandates of the State of Oregon are crucial aspects of plaintiffs' action. Without the attorneys' self-seeking involvment in the matter, the courts could not have acted so flagrantly.



E

The defendants refer to Judge Pihl's order to retain an attorney, (motion p-5). The operative facts here, are that Mrs. Baker did retain defendant Porcelli, but with specific instructions that he not interfer with Mrs. Baker's right to require rejected claims be tried in a regular court of law.

Defendant Porcelli appeared before Judge Pihl and failed to challenge the Judge's false affidavit against Mrs. Baker.

## ARGUMENTS

A

The defence will argue (motion p-11) that ORS 9.160 was not challenged as being unconstitutional. The truth is that, ORS 9.160 was amended by Judicial Legislation; stripped of its mandate for self-representation, by the probate court, and by subsequent appeal dismissals. Plaintiffs first cited Article I, §10, of the United States Constitution in their (Juris. Statement, Page 4) complaint.

B

Defendants' argument (motion p-12) is a gross distortion of the facts, whereas, Mrs. Baker had fully performed her duties as required by law.

C

Defendants' allegation (motion p-14) that the federal question was not "actually considered and decided", is false, because the courts could have decided the issue. The Oregon rule is that the Constitutionality of a statute must be raised in the trial court: State vs. O'Neill 21 OrApp 710,716 (1975) , and that a constitutional issue may be considered for the first time on appeal if there are compelling reasons to do so:

Damascus Community Church vs. Clackamus Co. 32 OrApp 3,13, note 2 (1978) 573 P2d 726, although the rule did not apply in that case.

D

Plaintiffs contend that Central vs Laidley 159 US 103,110 (1895), as cited (motion p-15) does not apply, as the question is not that the courts below misconstrued the law, but that the courts arbitrarily and illegally changed the law. The fact that the courts



had no legal authority to invade powers reserved to the State Legislature automatically invokes the Federal Separation of Powers clause.

As stated (Juris. Stat. p-7) ORS 9.320 is a prime right in the State of Oregon, as it is organic law, and only amendable by a vote of the people.

The Court in State Ex Rel Lucas vs. Goss 23 OrApp 501,504 (1975) 543 P2d 9, stated:

> It is axiomatic that the doctrine of separation of powers prohibits the judiciary from encroaching upon or interfering with the proper exercise of the legislative function.

E

The defendants alleged (motion p-16,17) that plaintiff's failure to obtain counsel and other alleged indiscretions resulted in her removal as personal representative. The essence of the Judge's order had been followed but the Judge had then issued a false affidavit and relied solely upon his own perjured statement as the basis to remove Mrs. Baker.

F

The defendants suggest (motion p-19) that their individual conduct is not applicable, but, in Flagg vs Brooks 436 US 149, 157 (1978) this Court stated:

> * * * only a state or a private person whose action 'may be fairly treated as that of the State itself',(citation omitted) 'may deprive him of an interest encompassed within the Fourteenth Amendment's protections,' * * * ".

Plaintiffs contend that whichever way the defendants classified plaintiffs' contract rights, the contract in question had been decided to be valid, and therefore, was fully protected by the Federal Constitution against a State's arbitrary interference. In Thorpe vs. Housing Authority 393US 268,278 (1968) note 31, the Court said:

> Although the constitutional prohibition of the impairment of contracts, U.S. Const. Art. I, §10, applies only to the States, we have held that '[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States.

G

Defendants state that (motion p-23) the Oregon Supreme Court's jurisdiction is discretionary.

Plaintifs submit, that is exactly the way in which the state courts have deprived them of their equal protections of the law. The court's arbitrary actions fly in the face of the State Constitutional Guarantees of



recourse for damage as a result of illegal acts, and the State Guarantees of jury trial.

I

The Oregon State Court of Appeals ruled in 1970, that it had authority to decide appeals without opinion. SEE:
State of Oregon v. Herried 30 OrApp 462,464 474 P2d 358.

The net effect is to prevent self-representation in the State appeals courts.

A local case, Lenske v. Souther, et al, CA13185, is another example of the courts' interference. Mr. Lenske has an action against one of the law firms appearing in this matter, and Mr. Lenske's case was dismissed without decision.

The Court of Appeals dismisses the pro se, and the State Supreme Court rubber stamps the decision.

II

This Court in Schilb vs. Kuebel 404 US 357,367,380 (1971) said:

> * * * a statutory classification based upon suspect criteria or affecting 'fundamental rights' will encounter equal protection difficulties unless justified by a 'compelling governmental interest'.

H

Defendants assert that (motion p-24,25) the courts' dismissals rest upon adequate non-federal basis, but they cite cases which do not support or apply. Michigan vs. Tyler 436 US 499,513 (1978) note 7, was a failure to timely raise the federal issue.

## SUMMATION

The facts of this case are lengthy and involved, but the issues are simple:

1. The statute ORS 9.160 is repugnant to Art. I, § 10 of the United States Constitution, as it stands amended by judicial legislation, in the light of the Federal Separation of Powers clause.

Lucas vs. Goss 23 OrApp 501,504 (1975):

> It is not within the province of the court to amend the terms of a statute because it operates unfairly in a particular instance, * * *.

2. State officers are acting with a class based animus against plaintiffs and all other pro se litigants, in a manner which deprives them of (a). recourse for damage as a result of illegal acts, and (b). jury trials, which said acts deprives them of equal protection of the law, as quaranteed by the Fourteenth Amendment of the United States Constitution.

Ortwein vs. Schwab 410 US 656,660 (1973):



> * * * even in criminal cases, due process does not require a State to provide an appellate system.

But, plaintiffs contend that, non-attorneys are in a suspect classification — where the appellate system has limited access, for members only.

Plaintiffs would assure the Court that it is not freedom of association which motivates the interest in judicial review, but solely to seek some semblance of justice from the courts.

## AFFIDAVIT

STATE OF OREGON )
COUNTY OF MULTNOMAH ) ss

*We, EDNA I. BAKER & ROGER L. BAKER, plaintiffs in the above matter, after being duly sworn, depose and say that the foregoing statements are true.*

_____
*Edna I. Baker, affiant/Roger L. Baker, affiant*

Subscribed and sworn to before me this_____ day of January, 1980.

_____
NOTARY PUBLIC for Oregon
My Commission expires.....